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MCI

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April 11, 1996
Mr. William F. Caton
Secretary
Federal communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter of Implementation of Section 302 of theTelecommunications Act of 1996, CS Docket No. 96-46; and Open Video Systems, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules. Sections 63.54-63.58, CC Docket No. 87-266 (Terminated).

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Corporation's Reply Comments regarding the above-captioned matter. An electronic version of MCI's Reply Comments have been delivered to Larry Walke of the Cable Bureau under separate cover.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Comments furnished for such purpose and remit same to the bearer.

Sincerely,

Lawrence Fenster

Lawrence Fenster
Senior Regulatory Analyst

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	

MCI REPLY COMMENTS

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its reply comments in the above-captioned docket. MCI's comments focused on three issues: (1) the need for proper cost allocation as a condition for open video system (OVS) certification; (2) whether market-based rates and performance criteria would yield just and reasonable rates; and (3) whether a specific regulatory framework should be adopted and how that framework should be constituted. Based on its analysis of the dangers of cross-subsidization, and the lack of competitive alternatives for wholesale video access and transport, MCI recommended the Commission: (1) adapt its Part 32, 36, 64, and 69 rules to the specific cost allocation challenges posed by open video systems (OVS) before the process of OVS certification begins; (2) require LECs to file unbundled and cost causative tariffs with cost support as a condition for OVS certification; (3) require OVS operators to charge their programming affiliates the tariffed rates for video carriage; and (4) require OVS operators to make their contracts available for public inspection.

After reviewing the comments of the other parties that filed comments in this proceeding, MCI believes the record shows convincing evidence that the Commission should adopt a specific regulatory framework along the lines advocated by MCI because:

(1) the market for video access and transport is not subject to effective competition; (2) Congress did not direct the Commission to eschew an affirmative and specific regulatory framework; and (3) the dangers of anticompetitive behavior such as cross subsidizing OVS and discriminating in favor of its own programming affiliates remain undisputed outcomes, absent regulatory protection.

II. The Market For Video Access And Transport Is Not Subject To Effective Competition

In its Notice, the Commission asked parties to comment on regulations prescribing just and reasonable rates for video transport, given that "open video system operators generally will be 'new' entrants in established video programming distribution markets, lacking in market power vis-à-vis video programming end users...."[1] In order to prescribe the appropriate method of establishing just and reasonable rates, one must first properly define the market. In the case of OVS, that means distinguishing the market for video program distribution from the market for video transport.

A. Video Program Distribution

To date, this market has been comprised of video program distributors: the Cable, MMDS, and DBS operators, who bundle together their own facilities with programming, and market this service to end-users. Prior to the Commission's establishment of the video dialtone concept, there was no functioning market for video access or transport. It would be incorrect to argue that programmers such as HBO, Nickelodeon, or CNN, are purchasing the service "video access and transport" when they negotiate with cable

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[1] Notice, para. 29.

operators to be included in their programming lineups. The reverse is actually the case. In this market, terms are negotiated for the lease of a program by the cable operator.[2] Programmers have no rights over the use of cable facilities as a result of this market transaction.

B. Video Transport

Now, with the advent of OVS and the initiation of a market for video transport, the video program distribution market may see additional entrants, including LEC programming affiliates as well as non-affiliated programming entities using OVS facilities. In its comments, MCI offered evidence that the market for video transport is not subject to effective competition, since, except for the OVS operator, there is no "supplier of wholesale video access and transport."[3] No other party has offered contravening evidence. The LECs and MFS have misunderstood the issue at hand. They have concluded that the market for video transport is competitive, by referring to the competitiveness of the market for video program distribution. However, the Notice did not state that the market for video transport was competitive. It only asked how OVS video transport rates should be set, given that the OVS operators will not be dominant firms in a different market, the downstream market for video program distribution.

This point is quite destructive of LEC and MFS arguments. In varying ways they argue that since OVS operators are not dominant firms in the downstream market for

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[2] Programmers who pay cable operators to be included in their lineup are not purchasing video access and transport. Programmers marketing new services charge operators a negative rate as the service is rolled out. They expect to have the price turn positive after a year or two. Even if the price remains negative, the programmer is still not purchasing the right to use the video transport facilities of the operator.

[3] MCI Comments at 6.

video program distribution, the Commission may rely on its *Competitive Carrier* decisions and forbear from regulating rates of video transport.[4] However, the market for which the Commission must determine just and reasonable rates is the upstream market for video transport. LECs are dominant firms in this market. No evidence has been provided for the record which contravenes MCI's analysis of this market. Consequently, applying the Commission's *Competitive Carrier* decisions would require affirmative regulation of rates. That is precisely what is required.

III. Congress Intended The Commission To Adopt A Specific Regulatory Framework

All parties agree that those LECs meeting the Commission's rate and nondiscriminatory access conditions for OVS certification, qualify for reduced regulation under Section 653(c) of the 1996 Act. The point of contention hinges on the nature of reduced regulation Congress intended to be available for OVS. To properly answer this question, one must first determine what type of regulation Congress intended for OVS.

A. Hybrid Regulatory Framework Intended For OVS

MCI maintains that Congress intended regulation of OVS to be a hybrid of Title II and Title VI, but neither Title II nor Title VI regulation *per se*. Congress intended some elements of common carrier regulation and some elements of cable regulation to apply. Subsection 653(c)(1)(B) of the 1996 Act requires that the Title VI-like provisions of public, educational, and governmental (PEG) access, must carry, and retransmission

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[4] See MFS Comments at 11; US West Comments at 4; USTA Comments at 14; NYNEX Comments at 23; and Comments of Bell Atlantic *et. al.* at 23.

consent, will apply to OVS. Subsection 653(c)(1)(A) requires that Title VI-like program access, ownership restrictions, negative option billing, subscriber privacy, and equal employment opportunity requirements apply to OVS. Finally, in subsection 653(b)(1)(A) Congress also required the Commission to develop Title II-like provisions with regard to setting rates for video transport and access supplied by OVS.

Congress intended the Commission to apply the principles governing the relevant parts of each Title II and Title VI to OVS. This hybrid regulation was not meant to add Title II requirements to similar Title VI requirements. Congress established a new regulatory mechanism in order to avoid subjecting LECs to duplicate regulation. As Congress stated: "...the requirements of this section shall apply in lieu of, and not in addition to, the requirements of Title II."[5]

B. Congress Intended A Specific Regulatory Framework For OVS

Congress intended OVS operators to be subject to reduced regulatory burdens. LECs and MFS interpret this to mean the Commission should not adopt a specific regulatory framework.[6] This argument is not supported by the 1996 Act. The 1996 Act exempted OVS from various Title II-like regulations. It eliminated a requirement that OVS operators "make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers."[7] The 1996 Act also eliminated

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[5] 1996 Act, Sec. 653(c)(2)(B)(3).

[6] See MFS Comments at 15; Bell Atlantic *et. al.* Comments at 7; NYNEX Comments at 5; USTA Comments at 8; US West Comments at 3.

[7] *Id.* at Sec. 651(b).

another Title II-like requirement, the need to obtain a section 214 certificate for the establishment of an OVS.[8]

The 1996 Act also exempted OVS operators from various Title VI regulations. Section 653(c)(1)(C) relieved OVS operators from commercial leased access, and most of the franchise-related requirements to which cable companies are subject. Section 653(a)(1) required the Commission to either approve or disapprove an OVS certification within 10 days of the request for certification. While Congress did eliminate some Title II as well as Title VI regulations, it did not reduce the regulatory burden of remaining regulations:

> "...the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection."[9]

It is noteworthy that Congress chose not to reduce regulation on OVS by mandating an across-the-board reduction in either Title II or Title VI regulation.[10] Consequently, there is no support for arguments made by MFS and LECs that the Commission need not adopt a specific regulatory framework. Congress intended the remaining elements of both Title II and Title VI to be applied to OVS in order to reproduce the regulatory safeguards they provide.

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[8] *Id,* at Sec. 651(c)

[9] *Id.* at Sec. 653(c)(2)(A).

[10] Of course, operators may be eligible for forbearance and other forms of reduced regulation if conditions justify such treatment. But this type of reduced regulation does not lie at the heart of what Congress specifically intended for OVS.

IV. Anticompetitive Actions

Public interest parties, state and local regulators, interexchange carriers, cable companies, CPE manufacturers, and programmers contend that LECs retain incentives to engage in anticompetitive behaviors, either by cross subsidizing their video systems by overcharging customers of monopoly telephone services, or by favoring their programming entity in the allocation of channel location, channel capacity, etc.

A. Cost Allocation

Telephone services devoid of widespread competitive alternatives, such as access rates charged by LECs, are priced well above economic cost. This permits LECs to subsidize their entry into new lines of business, such as OVS. So long as there are some LEC services not subject to effective competition, LECs will have the motive, and absent proper cost allocation, the opportunity to cross subsidize.

Except for US West, LECs are silent on the question of cost allocation to OVS. US West argues that there is no need for cost allocation where LECs are no longer regulated under rate of return regulation, because LECs would not be able to raise rates above competitive levels under other forms of regulation.[11] This argument is incorrect. LECs have an incentive to shift the recovery of costs incurred for the provision of more competitive services onto those services able to sustain a supra-competitive price, regardless of the regulatory regime. Whether LECs succeed, depends on whether regulators prevent regulated prices from rising above their competitive levels. This can occur under a price cap regime either if base rates are above competitive levels (perhaps

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[11] US West Comments at 9.

because costs have been misallocated); or if actual productivity exceeds the productivity index, and misallocated costs reduce the amount of profits available for sharing. Consequently, US West's argument that the Commission need not address cost allocation to OVS is not be supported by economic logic.

B. Other Anticompetitive Behaviors

LECs generally argue that the Commission does not need to adopt specific regulations preventing anticompetitive actions. Instead, they argue that the Commission need only adopt statutory language prohibiting discrimination.[12] As explained in Section III.B above, the LECs are incorrect. Congress did require the Commission to develop a new, and specific, regulatory framework for OVS. The Commission must establish such a framework in order to protect against LEC attempts to undermine the "openness" of OVS.

MCI identifies new evidence, provided by Bell Atlantic *et. al.*, that LECs intend to undermine the openness of open video systems and thereby lessen the number of video distributors. Bell Atlantic proposes that the Commission treat OVS as the same as cable service, rather than as an open video system. For example:

1. Bell Atlantic *et. al.* contend the market relationship between programmers and OVS operators should be the same as between programmers and cable operators. Yet, cable systems are closed systems based on contract carriage;[13]
2. Bell Atlantic *et. al* propose the Commission judge all OVS rules according to whether they would "make open video systems an attractive alternative for cable operators;"[14]

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[12] See, e.g., Comments of Bell Atlantic, *et. al.* at 11; US West Comments at 16; NYNEX Comments at 7.

[13] "Open video systems will not succeed if operators must force video programming providers to accept unfamiliar or undesired business arrangements." *Id.* at 10.

[14] *Id.* at 5.

3. Bell Atlantic *et. al* contend OVS operators are not obligated to provide capacity to multiple video program distributors;[15]

4. Bell Atlantic *et. al* contend that OVS operators should be able to deny carriage to parties that do not have contracts with programmers in place prior to approaching an OVS operator for carriage.[16]

V. Conclusion

Based on the arguments presented above, MCI urges the Commission to establish a specific regulatory framework for OVS. This framework should require LECs to: 1) perform proper allocation of costs prior to submission of OVS certification; 2) submit unbundled and cost causative tariffs with cost support as a condition for OVS certification; 3) establish a fully separate programming affiliate; 4) require OVS operators to charge their programming affiliated the tariffed rates for video carriage; and 5) require OVS operators to make their contracts available for public inspection.

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[15] *Id.* at 12.

[16] *Id.* at 24.

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on April 11, 1996.

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CERTIFICATE OF SERIVCE

I, Stan Miller, do hereby cerfity that copies of the foregoing Comments were sent via first class mail, postage paid, to the following on this 11th day of April, 1996.

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